

**TWENTY FIRST CENTURY OILS
SDN. BHD.**

v.

**BANK OF COMMERCE (M) BHD.
& 2 ORS.
(NO. 1)**

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN
HAJI AHMAD J
[ORIGINATING SUMMONS
NO. D5-24-35-93]
15 APRIL 1993

PRACTICE AND PROCEDURE: Contempt proceedings filed - Party in contempt applying to set aside injunction obtained under s. 176 Companies Act 1965 - Preliminary objection raised - Whether party against whom leave obtained to institute committal proceedings can be heard to make any application without purging the contempt.

On 17 February 1993, the applicant, Twenty First Century Oils Sdn. Bhd. ("Twenty First Century") obtained an order *ex-parte* under the provisions of s. 176 of the Companies Act 1965 restraining the creditors of Twenty First Century from taking further actions or proceedings including but not limited to any Court action, appointment of Receivers and Managers and/or taking any action/proceeding whatsoever under any of the security documents signed with or given to the creditors against Twenty First Century and any third party who have given security for and on behalf of Twenty First Century until completion of the Composite Schemes of Arrangement proposed pursuant to s. 176(10) of the Companies Act 1965 except by leave of Court and subject to such terms as the Court may impose.

BOC applied by way of summons-in-chambers upon a certificate of urgency on 3 March 1993 to intervene and set aside the order of 17 February 1993. At the hearing of the application of BOC, Counsel for Twenty First Century raised a preliminary objection that as Twenty First Century had obtained leave to institute committal proceedings against the officers of the Bank, the Bank's application to set aside the restraining order of 17 February 1993 should be adjourned until the application to commit for contempt is heard or until the contempt is purged.

a Held:

[1] The rule that a party in contempt cannot be heard or take proceedings in the same cause until he had purged his contempt could not apply to an application to set aside an injunction granted *ex-parte*.

b [2] The Bank should not be precluded from stating its stand despite the pending committal proceedings.

[Preliminary objection accordingly dismissed].

Cases referred to:

- c** *Hadkinson v. Hadkinson* [1952] CA 285 (**dist**)
Avery v. Andrews [1882] 51 L.J. Ch. 414 (**dist**)
Instituto Bancario San Paolo Di Torino Spa v. Colour Touch Sdn. Bhd. & Anor. (Mahkamah Tinggi Kuala Lumpur Guaman Sivil No. D5-22-1410-92) Judgment Today 9/93 (**full**)

d Legislation referred to:

Companies Act 1965, s. 176(10)
Rules of the High Court 1980, O. 62 r. 5

For the applicant - Paul Ong (Harinder Kaur Veriah with him); M/s. Paul Ong & Associates
For the intervenor/applicant - N. Chandran (Pushpa Menon with him); M/s. Adnan Sundra & Low

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JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

The applicant had by originating summons filed on 12 February 1993 applied for the following orders *ex parte*:

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(a) that the applicant may be at liberty to convene separate meetings of its classes of creditors, and be at liberty to convene a meeting of its shareholders for the purpose of considering and if though fit approving with or without modification the Composite Schemes of Arrangement proposed to be made between the applicant and its creditors as defined in the Composite Schemes of Arrangement pursuant to s. 176 of the Companies Act 1965 ("the Court Meetings");

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(b) that the directions may be given as to the time, date and place of the Court Meetings and to the method of convening the applicant's Court Meetings;

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(c) that Mr. Gan Ah Tee failing him Mr. Ooi Woon Chee both of Peat Marwick Consultants Sdn. Bhd. may be appointed as Chairman and the said Chairman be

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directed to report the results thereof to this Honourable Court;

- (d) that the plaintiff or plaintiffs to the actions or proceedings against the applicant more specifically set out in exhibit "A-7" annexed to the affidavit herein and annexed to the originating summons and all and/or any of the creditors of the applicant be restrained whether by themselves, their servants or agents or otherwise, from all further actions or proceedings including but not limited to any Court action, appointment of Receivers and Managers and/or taking any action/proceeding whatsoever under any of the security documents signed with or given to the creditors against the applicant and any third party who have given security for and on behalf of the applicant until completion of the Composite Schemes of Arrangement proposed herein *inter alia* pursuant to s. 176(10) of the Companies Act 1965 except by leave of Court and subject to such terms as this Honourable Court may impose;
- (e) that pursuant to O. 62 r. 5 of the Rules of the High Court 1980, the applicant may serve a copy of the said restraining order on the plaintiff or plaintiffs to the action or proceedings more specifically set out in the exhibit "A-7" annexed to the affidavit herein and annexed to the originating summons and on the creditors of the applicant or any of them by way of ordinary post at their last known address and that upon such service, this order shall be deemed to have been duly served; and
- (f) such other directions as this Honourable Court shall deem fit.

The orders were granted on 17 February 1993 and for prayer (b), the Court had fixed the time as 10 a.m. for secured creditors and 11 a.m. for unsecured creditors, the date as 23 July 1993 and the place at the Hotel Regent, Kuala Lumpur.

By summons in chambers filed upon a certificate of urgency on 3 March 1993, Bank of Commerce (M) Bhd. had applied to intervene to set aside the orders obtained on 17 February 1993, to appoint two named persons from Price Waterhouse as interim Receivers and Managers pending the application, costs and other relief. This was followed by two other

- a similar applications also filed upon certificates of urgency from Utama Wardley Bhd. on 5 March 1993 except that there was no application for the appointment of interim Receivers and Managers, and from Rakyat Merchant Bankers Bhd. on 12 March 1993 except that the two Receivers and Managers to be appointed were not as an interim measure pending the application. For this appeal, however, we are only concerned with the application by Bank of Commerce (M) Bhd. (herein-after "the intervenor").
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- c According to learned Counsel for the applicant when making his preliminary objection, they had filed an *ex parte* notice of motion and had been granted leave to obtain a committal order against the President and Vice President of the intervenor for committing contempt of Court by asking Barclays Bank PLC in Singapore to pay them one million U.S. dollars in consideration of the intervenor granting credit facilities to the applicant. As such, he insisted that the intervenor could not be heard until they had purged their contempt by returning the said amount to Barclays Bank PLC in Singapore.
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- e Learned Counsel for the intervenor had informed the Court that they had not been served with the papers for the contempt proceedings and had argued that there was no basis for such as it had arisen from an *ex parte* order. In any event, they were denying the alleged contempt. Learned Counsel for the applicant replied that they were in the process of serving the contempt proceeding papers and that a clear case of contempt had been made out before the Court.
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- g I had occasion to deal with a similar application in another matter namely in the case of *Instituto Bancario San Paolo Di Torino Spa v. Colour Touch Sdn. Bhd. & Anor.* (Mahkamah Tinggi Kuala Lumpur Guaman Sivil No. D5-22-1410-92) which had been decided about three and a half months earlier. In the circumstances, I was of the opinion that I should decide similarly for this objection. It is certainly appropriate, therefore, for me to reproduce my finding in that earlier matter:
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- i At the outset, learned Counsel for the plaintiff had preliminarily objected to the fact, which I might add surprised learned Counsel for the defendants somewhat, that the defendants had failed to comply with prayer 5 of

the said order and that since they were in contempt of Court, they should not be heard. She had referred me to pp. 460 and 461 of Borrie and Lowe's Law of Contempt but on a cursory reading of the referred pages during the brief recess following the objection, I had discovered that the origin of the rule that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt applied only where a writ of attachment had issued or where an order for committal had been made. At p. 461 it is further stated:

It is also established that the rule is inapplicable to an application to purge the contempt, or to the bringing of an appeal with a view to setting aside the order upon which the alleged contempt is founded. A party will also be heard to support a submission that upon the true construction of the order alleged to be disobeyed, his actions did not constitute a contempt, or that having regard to all the circumstances, he ought not to be treated as being in contempt. The reason that a party is allowed to be heard in these latter cases is that the object of the further application is to clear the very contempt complained of; on the other hand the rule does *prima facie* operate where the party in contempt seeks to invoke the aid of the Court in the same cause upon some other issue than the issue of contempt itself.

In the event, I was more inclined to hold the view that the rule could not apply to set aside an injunction granted *ex parte* and accordingly overruled the preliminary objection.

I must add that *Hadkinson v. Hadkinson* [1952] CA 285 need to be distinguished as there the wife had admitted the contempt complained of by the husband. There it had been held that:

it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a Court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the Courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

a It was further decided that:

the fact that a party to a cause had disobeyed an order of the Court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it might make, then the Court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.

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c Similarly, in *Avery v. Andrews* [1882] 51 LJ Ch. 414, the Court had found the defendants guilty of contempt. In the instant case, however, the contempt proceedings have yet to be heard.

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In the final analysis, I was of the considered view that the intervenor should not be precluded from stating his stand despite the pending committal proceedings. I had, therefore, accordingly dismissed the applicant's preliminary objection.

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